



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
United States Patent and Trademark Office  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/995,358	11/26/2001	Jules Zecchino	2870/566	2755
7590	03/26/2007		EXAMINER	
KAREN A. LOWNEY, ESQ. ESTEE LAUDER COMPANIES 125 PINELAWN ROAD MELVILLE, NY 11747			FUBARA, BLESSING M	
			ART UNIT	PAPER NUMBER
			1618	
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
3 MONTHS		03/26/2007	PAPER	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<b>Office Action Summary</b>	Application No.	Applicant(s)
	09/995,358	ZECCHINO ET AL.
	Examiner	Art Unit
	Blessing M. Fubara	1618

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

1) Responsive to communication(s) filed on 28 November 2006.

2a) This action is FINAL.      2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

4) Claim(s) 1-10, 12-16 and 18-26 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 1-10, 12-16 and 18-26 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11) The proposed drawing correction filed on \_\_\_\_\_ is: a) approved b) disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12) The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

13) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some \* c) None of:

1. Certified copies of the priority documents have been received.

2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.

3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) The translation of the foreign language provisional application has been received.

15) Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

1) <input type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)
3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____	6) <input type="checkbox"/> Other: _____

## **DETAILED ACTION**

Examiner acknowledges receipt of request for continued examination under 37 CFR 1.114, amendment and remarks filed 11/28/06. Claims 1-10, 12-16 and 18-21 are pending.

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 11/28/06 has been entered.

### ***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later

invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

4. Claims 1-10, 12-16 and 18-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wheeler (WO 97/32559) in view of Clariant product brochure.

Wheeler teaches the preparation of bi-liquid foam by combining oil-based biliquid foam and an aqueous gel, CARBOPOL gelling polymer and the pH is adjusted to 6.5 with citric acid (page 6, lines 1-10 and 20-23 and example 3).

Wheeler teaches cosmetic or pharmaceutical composition comprising a stable dispersion that comprises oil-based bi-liquid foam and an aqueous gel. The oil-based bi-liquid foam of Wheeler is from 1% to 80% by weight of the total formulation. The composition Of Wheeler also comprises silicone oils wherein the oils can be cyclomethicone, dimethicone, dimethicone copolyol, lanolin and dimethiconol. Wheeler teaches a formulation further comprising from 0.05% to 0.5% of surfactant and active ingredient in the aqueous or oily phase. Wheeler teaches that the low level of surfactant incorporated into the formulation comprises quaternary ammonium sulfonium salts, amphoteric surfactant, anionic surfactant, alpha-olefin sulfonate, and ester-linked sulfonate. Salts of cross-linked polymers of acrylic acid (carbomers), glycetyl polymethacrylates, or copolymers of polyoxyethylene/polyoxypropylene in mixtures with the previously listed surfactants may serve as gelling agents. Wheeler's composition (example 3) comprises Citric acid at 1% (Example 2) and the composition is adjusted to pH 6.5 (less than pH 7). See page 3, paragraph 2 to page 5 paragraph 2. The 1% of the hydroxyl acid in Example 2 meets the salt requirement in claims 1, 3-5.

Regarding the percent amounts of the gallant and the salt, it would be obvious to use appropriate amount of the gallant to effect the desired viscosity of the gelled composition. However, Wheeler does not use polymeric sulfonic acid as a gelling agent. However, Clariant product brochure teaches Aristoflex AVC or copolymer of polyacryldimethyltauramide and vinylformamide gelling agent for aqueous systems and thickening agent for oil-in-water emulsions. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to prepare the bi-liquid foam by gelling the composition with CARBOMER polymer according to the teachings of Wheeler. One having ordinary skill in the art would have been motivated to substitute CARBOMER gelling agent with another gelling agent such as polyacryldimethyltauramide-co-vinylformamide (Aristoflex) with the expectation that the aqueous composition will be gelled.

***Response to Arguments***

5. Applicant's arguments filed 11/28/06 have been fully considered but they are not persuasive.

Applicant argues that the composition of Wheeler is a shampoo/shower gel and that less than 1% surfactant cannot be used cleanse the hair, less than pH of 7 is unsuitable for shampoo or shower gel, applicant had provided declaration that the gellants recommended by Wheeler does not provide homogeneous and stable product at pH's of less than 7 and that the sulfonic acid based gelling agents as declared by applicant is superior to the Wheeler gelling agents.

**Response:**

The comprising language of the claims is open and does not therefore exclude the other surfactants in the composition of Wheeler. The polymeric sulfonic gallant disclosed in the Clariant product brochure is a known gelling agent for aqueous systems and thickening agent for oil-in-water emulsions. Thus, contrary to applicants' assertion that there is no suggestion in either reference to substitute polymeric sulfonic acid for carbomer as a gallant, the polymeric sulfonic acid is art recognized gelling agent for aqueous systems and thickening agent for oil-in-water emulsions so that using the polymeric sulfonic acid disclosed in the Clariant product brochure in the biliquid foam of Wheeler as a substitute for the carbomer would be expected to successfully gel or thicken the composition of Wheeler in light of the art recognized properties of the polymeric sulfonic acid. Applicants' specification at paragraph [0008] of the published application recognizes WO 97/32559 as disclosing bi-liquid foams and the WO 97/32559 specifically discloses bi-liquid foams (see the abstract, for example) and applicants' declarations assigning Wheeler as disclosing compositions outside the definition of a biliquid foam appear to give definitions that go against teachings of the prior art and also goes against applicants admission that the WO 97/32559 discloses biliquid foams. The declaration does not provide scientific data disproving the art recognized biliquid foam of Wheeler. Although, applicants state that Wheeler's example 3 (page 9) discloses large amount of surfactant in excess of 50%, it is noted that example 3 starts with 33% and 30% surfactant so that the resultant percent amount of surfactant cannot be greater than 50%, and this is supported by 4<sup>th</sup> paragraph of the WO 97/32559 where it states "surfactant to stabilize the formulation may comprise between 0.05 and

0.5%, and preferably between 0.05 and 0.3%, which is less than 1%. This clearly shows that the percent surfactant is desired to be less than 1%.

No claim is allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Blessing M. Fubara whose telephone number is (571) 272-0594. The examiner can normally be reached on 7 a.m. to 5:30 p.m. (Monday to Thursday).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael G. Hartley can be reached on (571) 272-0616. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Blessing Fubara  
Patent Examiner  
Tech. Center 1600

